No. 12369

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

:UTH RADOMSKY,

Appellant,

vs.

JNITED STATES OF AMERICA,

Appellee.

PON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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United States Attorney
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17 UNITED STATES COURT HOUSE
:ATTLE 4, WASHINGTON

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BRIEF OF APPELLEE

JURISDICTION

In the present case Ruth Radomsky was regularly indicted, represented by counsel of her own choosing, tried and convicted of perjury in the District Court of the United States for the Western District of Washington, Northern Division and sen-

tenced to imprisonment for six months. A copy of the Indictment will be found on page 2 of the Transcript of the Record. The appellant is at liberty on $1,500 cash bail pending this appeal. Jurisdiction is based upon Section 1621 of Title 18, U.S.C.

As alleged in the indictment, the testimony which is alleged to be false was given by the appellant after having been sworn as a witness to testify truly in the case of *United States v. Robert Olson*, then being tried before a jury in the United States District Court for the Western District of Washington, before the Honorable Lloyd L. Black, United States District Judge.

STATEMENT OF THE CASE

On February 3, 1949, Robert Olson was on trial in the United States District Court for the Western District of Washington, for the crime of sending through the United States mails a communication wherein he threatened to kill his former wife, Leska Stack. Robert Olson took the stand and admitted having prepared the communication for mailing, but denied ever having placed the envelope containing the threat in an authorized depository for the United States mail. The envelope which contained the threatening communication was received by the addressee and was introduced in evidence at the Olson trial.

This envelope bore a postmark "Bremerton, Wash., January 14, 5:00 p. m. 1948." (Exhibit No. 3).

Ruth Radomsky, the appellant herein, after being called as a defense witness and properly administered an oath to testify truly, testified: That she and her husband were living next door to Mr. Olson during the month of January, 1948; that she kept Mr. Olson's house tidy and did his laundry for him; that on January 13, 1948, she entered Mr. Olson's house early in the morning just after Mr. Olson had left for work; that she entered Mr. Olson's house for the purpose of picking up his laundry; that upon entering the kitchen in Mr. Olson's house she saw a ready-stamped envelope addressed to Mrs. Leska Stack in a city in California lying on the kitchen table; that she picked up the envelope, read the address and turned it over to determine whether or not it was sealed; that upon finding that the envelope was addressed, sealed, properly stamped and ready for mailing, she ran out of the house to catch Mr. Olson for the purpose of giving him this envelope, thinking that he had intended to take it with him but had forgotten it; that upon reaching the bus stop where Mr. Olson would have boarded a bus, she found that Mr. Olson had already left; that she then walked over to the mail box by Baker's store and mailed this particular en-

velope in that mail box. (Exhibit No. 1, T.P. 138, 139).

Robert Olson was acquitted of the crime with which he was charged.

The appellant, Ruth Radomsky, was then indicted for perjury, the indictment alleging in effect that the testimony of Ruth Radomsky that she mailed the envelope in question in the mail box by Baker's store was false. At the trial in the present case the jury found appellant, Ruth Radomsky, guilty as charged in the indictment. The testimony adduced by the Government proved that it was impossible for an envelope bearing a postmark "Bremerton, Wash. January 14, 5:00 p. m., 1948" to have been deposited in the mail box by Baker's store in Bremerton, Washington.

The testimony adduced by the Government proved that:

1. The cancelling machine in the post office at Bremerton places a cancellation mark on the stamp on the envelope and prints on the face of the envelope the words "Bremerton, Wash." and the time and date of cancellation, and that this machine so cancels letters at the rate of two hundred to six hundred per minute (T.P. 140).

2. On the hour and half hour the time on the cancelling machine is set ahead one-half hour so that the time printed on the envelope by the cancelling machine is one half hour ahead, that is, at 4:30 p. m. the cancelling machine is set for 5:00 so that all letters cancelled between 4:30 and 5:00 p. m. bear a 5:00 p. m. postmark (T.P. 141).

3. Carriers bringing mail in from collection boxes, place the collected mail on the "facing table" where it is promptly run through the cancelling machine which is located adjacent to the facing table (T.P. 140, 158, 159, 173, Exhibit Nos. 11, 12, 13).

4. On occasions the cancelling machine will skip or miss an envelope. That such letters so skipped or missed are promptly recovered and recancelled with a maximum possible delay of one-half hour in the cancellation time (T.P. 166, 167, 175).

5. On January 13, and 14, 1948, the first collection from the mail box at Baker's store was made by truck carrier (T. P. 80). He left the post office at approximately 8:30 a. m. (T. P. 45, Exhibit Nos. 8 and 9) and returned with the mail which he had collected from the box at Baker's store at 9:49 a. m. (T.P. 44, 79, Exhibit No. 8) and 9:42 a. m. (T.P. 46, 79, Exhibit No. 9) respectively, on such dates, and promptly deposited this mail on the facing table (T.P.

80, 81), taking particular care to see that all mail so collected was placed on the facing table (T.P. 81), punching his time clock after so doing (T.P. 84).

6. All mail reaching the facing table by 10:00 a. m. on January 13, and 14, 1948, would be run through the cancelling machine and bear a postmark not later than 10:30 a. m. (T.P. 147, 173, 174).

7. On January 13, 1948, the foot carrier who collected the mail at Baker's store at approximately 11:45 a. m. (T.P. 100), the second and last collection of the day (T.P. 92, 99), returned to the post office at 12:34 p. m. (T.P. 97, Exhibit No. 7) and promptly deposited the mail so collected upon the facing table (T.P. 94), taking particular care to see that all mail so collected was left on the facing table (T.P. 55, 97, 104, 105).

8. All mail reaching the facing table between 12:30 and 1:30 p. m. on January 13, 1948, would bear a postmark as imprinted by the cancellation machine of not later than 1:30 p. m. (T.P. 148, 168, 174),

9. On January 14, 1948, the foot carrier who made the second and last collection for the day from the mail box at Baker's store at approximately noon (T.P. 109, 118) returned to the post office at 1:14 p. m. (T.P. 113) and promptly deposited the mail so

collected upon the facing table (T.P. 110), taking particular care to see that all mail so collected was placed on the facing table (T.P. 112).

10. Mail reaching the facing table between 1:00 and 1:30 p. m. on January 14, 1948, would bear a postmark as imprinted by the cancelling machine of not later than 2:00 p. m. (T.P. 150, 174).

11. There were no collections made from the mail box at Baker's store after the collection made by the foot carrier, who returned to the post office at 1:14 p. m. on January 14, until the morning of January 15, 1948, when the truck carrier would again make his collection (T.P. 53).

13. Ruth Radomsky's home and Baker's store are about two miles from the laundry where Ruth Radomsky works, and on January 13, and 14, 1948, Ruth Radomsky was at work at 7:45 a. m. at said laundry (T.P. 182, 183, Exhibit No. 18).

13. All mail in the Bremerton post office destined for California was sacked and out of the post office by 12:25 p. m. on January 13, and 14, 1948, respectively (T.P. 145, 148).

14. The volume of mail which passed through the Bremerton post office on January 13, and 14, 1948 was normal (T.P. 151).

15. There was a full crew working in the post office on January 13, and 14, 1948, but the volume of mail was not such that any employees were required to work overtime (T.P. 143, 151, 152, 153).

16. On January 13, and 14, 1948, the period between 10:00 a. m. and 11:00 a. m. was not a peak period with respect to the volume of mail being handled by the post office in Bremerton, Washington, but was a normal period, and the time between 12:30 and 1:30 p. m. on said dates was considered to be a slack period (T.P. 144, 147, 148, 169, 174).

17. Shortly after Robert Olson was indicted he bought a house and gave the same to appellant, Ruth Radomsky, and her husband (T.P. 185 through 189).

At the conclusion of the Government's case appellant moved for a judgment of acquittal. The trial Judge denied this motion. The appellant thereupon presented evidence in her own behalf. In addition to other witnesses, including Robert Olson, the appellant herself took the witness stand and testified on her own behalf (T.P. 207). The appellant reiterated her testimony that she mailed the envelope in question in the mail box by Baker's store on January 13, 1948, at 7:20 a. m. (T.P. 334, 335, 336, 360). The appellant further testified: That at the time she mailed the said envelope she had on a wash dress,

but made no mention of wearing a sweater or any other outer garment (T.P. 360); that at the time she took the letter from Mr. Olson's house to the mail box at Baker's store she was hurrying with her home work so that she could get to her job at the laundry on time (T.P. 356); that she immediately saw the envelope in question lying upon the table upon her entering the kitchen in Mr. Olson's house (T.P. 355, 356); that after examining the envelope she left the house to look for Mr. Olson; that she went out of the house and looked towards the alley and that she could see clearly out to the alley (T.P. 357), that she proceeded to the alley and could then see clearly all the way to the street (T.P. 358); that she proceeded to the street and then looked up towards the bus stop to see if Mr. Olson was there, but that he was not there (T.P. 359); that she then walked approximately 200 feet to the mail box at Baker's store and mailed the envelope in question (T.P. 359).

When the appellant was questioned on cross-examination as to whether or not it was dark in Olson's kitchen at 7:00 a. m. on January 13, 1948, she testified that it wouldn't be dark in the kitchen because of the large windows (T.P. 361, 362). The appellant was given every opportunity to say she turned on the lights but she refused so to do, and relied upon the light coming in the window to fur-

nish adequate light to see the envelope and read the address thereon (T.P. 355, 356, 361, 362).

(It is here called to the Court's attention that at 7:00 a. m. in the middle of January in the Western District of Washington, it is still very dark, and each juror, being a resident of the Western District of the Northern Division of Washington, knew such fact personally. The jurors likewise knew that in the middle of January it is too cold to be running around the neighborhood in a wash dress.)

At the conclusion of all the testimony the appellant's counsel did not again move for a judgment of acquittal.

SPECIFICATIONS OF ERROR

The Specifications of Error upon which the appellant relies are set out on pages 8 and 9 of the appellant's brief.

The appellee will discuss the law dealing with the appellant's waiver of her right to challenge the sufficiency of the evidence by failing to make the proper motion at the conclusion of the evidence under Section I of the Argument herein.

Inasmuch as the first and second Specifications of Error both challenge the sufficiency of the evidence,

those two specifications will be discussed together under Section II of the Argument herein.

The third and fourth Specifications of Error set out in appellant's brief will be discussed under III and IV of the Argument herein.

ARGUMENT

I

By offering evidence in her defense after challenging the sufficiency of the evidence by moving for a judgment of acquittal at the close of the Government's case, the appellant has waived the right to rely upon that motion upon appeal. At the conclusion of all of the evidence, both the appellee's and the appellant's, the appellant did not again challenge the sufficiency of the evidence. By failing so to do, the appellant has waived the right to challenge the evidence at this time. The rule of law is well established by many rulings of the Ninth Circuit, the most recent case being *James M. Mosca v. United States*, (9 C.A.) 174 F. (2d) 448. Judge Mathews wrote the decision in which the following ruling is made:

> "Specification 2 is that the court erred in denying a motion of appellant for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. There was only one mo-

tion of appellant for judment of acquittal. That motion was made on September 24, 1947, at the close of the evidence offered by the Government. After its denial, appellant offered evidence, which the court received, whereupon all the evidence was closed, the case was argued and submitted to the jury, a verdict was returned, and the jury was discharged. Five days after the jury was discharged, appellant filed a so-called "renewal of motion for judgment of acquittal," apparently believing that he could thereby renew the motion of September 24, 1947. Appellant was mistaken. The provision in Rule 29 that "the motion may be renewed within 5 days after the jury is discharged" applies only to a motion made at the close of all the evidence. *In this case, there was no such motion. Appellant, by offering evidence, waived the motion of September 24, 1947. Hence that motion need not be considered.* However, we have considered it and find no merit in it." (Italics ours).

The case of *United States v. Goldstein*, (2 C.A.) 168 F. (2d) 666, is cited in the Mosca decision. The Goldstein case was a perjury case. On page 670 of that decision the Court stated:

> "*In other words, if the evidence is short as the prosecution leaves it, he may take advantage of that. But if he amplifies the record on the facts in attempting to make the case for acquittal he must assume the risk of having the prosecution's case bolstered in the process. The new rule does not attempt to make error in non-compliance with its term any different in respect to waiver than any other error would be.*" (Italics ours).

And further on in the same opinion, the Court states:

> "Consequently, the motion to dismiss made at the close of all the evidence is the only one now open for consideration."

In the case at hand, there being no motion for acquittal challenging the sufficiency of the evidence at the close of all the evidence, this Court, in the light of its former decision, should not now consider a motion by the appellant for acquittal. In view of the fact that in the Mosca case the Court stated that it had considered the appellant's motion but found no merit in it, the Specifications of Error set out in the appellant's brief will be answered herein.

II

Both the appellant's first and second Specification of Error challenge the legal sufficiency of the evidence adduced at the trial. These specifications of error will be discussed together since the points raised are in fact identical.

The appellant's real complaint in this appeal is that the Government did not produce an eye-witness who testified that he saw the appellant when she did not mail the envelope. The Government was faced with proving a negative fact. This was accomplished by proving a contrary state of facts, from that sworn

to by the appellant, which is absolutely incompatible with, and physically inconsistent with, the testimony of the appellant. The authorities which held that such evidence is legally sufficient to uphold a perjury conviction will be reviewed.

The case of *Hammer v. United States* 271 U.S. 620, is the latest case decided by the United States Supreme Court in which the legal sufficiency of the evidence in a perjury case was ruled upon. In that decision, on page 627, the Supreme Court announced the doctrine on this subject which is controlling upon the Federal Courts of the United States in the following language:

> "The question is not the same as that arising in a prosecution for perjury where the defendant's own acts, business transactions, documents or correspondence are brought forward to establish the falsity of his oath alleged as perjury. That, in some cases, the falsity charged may be shown by evidence other than the testimony of living witnesses is forcibly shown by the opinion of this court in *U. S. vs. Wood*, 14 Pet. 430, 443. That case shows that the rule which forbids conviction on the unsupported testimony of one witness as to falsity of the matter alleged as perjury, *does not relate to the kind or amount of other evidence required to establish that fact. Undoubtedly, in some cases, documents emanating from the accused and the attending circumstances may constitute better evidence of such falsity than any amount of oral testimony.*" (Italics ours).

It is doubtful that the Supreme Court could more clearly recognize the fact that perjury can be proved by evidence other than two eye-witnesses who actually saw the appellant do otherwise than what she testified. By such language the Supreme Court likewise recognizes that there are cases such as the one at hand in which the proof of the falsity of the statement is not susceptible of eyewitness testimony. In the case at hand it would be impossible to produce any witness who could testify that they saw the appellant not mail the envelope.

The appellant in her brief has also quoted that portion of the Hammer case which has been quoted herein. However, the appellant, realizing that this language in the Hammer case supported the Government's contention in the case at hand, has chosen to rewrite the decision of the United States Supreme Court under the guise of paraphrasing the language in the decision in the Hammer case. (See page 28 of appellant's brief).

It is the contention of the Government that the envelope, Exhibit No. 3, is documentary evidence emanating from the appellant. At the time the appellant testified that she mailed the envelope in the mail box by Baker's store, the envelope bore the postmark "Bremerton, Wash., 5:00 p. m., January 14,

1948." The envelope then became the document claimed by the appellant to have emanated from her. This document, together with the attending circumstances surrounding her claiming it, was presented as evidence in the case at hand. The Government then corroborated this documentary evidence with six witnesses from the post office at Bremerton, Washington, who testified clearly, positively and directly that the appellant's testimony that she deposited the envelope in the mail box by Baker's store was false. The Government then produced testimony to show that Robert Olson had given the appellant a house as a bribe for her false testimony.

According to the rule laid down in the Hammer case this evidence is sufficient. We have in this case a document emanating from the accused, together with the attending circumstances. It was upon this theory which the trial Judge based his ruling denying the appellant's motion for a judgment of acquital in the conclusion of the Government's case.

Weiler v. United States, 323 U.S. 606, has been decided since the Hammer case. The decision in the Weiler case is confined to the question of whether or not the trial Judge erred in denying the giving of a certain instruction. On Page 608 of the decision it is stated:

> "In granting certiorari we limit review solely to the question of whether the trial Judge erred in denying this charge."

The charge which the trial Judge refused to give in the Weiler case is set out on page 607 of the decision as follows:

> "The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find the defendant not guilty."

In the case at hand, the trial Judge gave the instruction which was refused by the trial Judge in the Weiler case in the exact language as above quoted (T.P. 378). The Supreme Court in the Weiler case then goes on to state that it is for the jury to determine if the falsity of testimony is properly proven:

> "The Court below held, and the government argues here, that it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have been presented to sustain a conviction. Two elements must enter into a determination that corroborative evidence is sufficent: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy. *To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury.* Thus, to permit the judge finally to pass upon this ques-

> tion would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is to bar a jury from convicting for perjury on the uncorroborated oath of a single witness. It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment. Cf. *Bruno v. United States*, 308 U.S. 287. The refusal of the trial judge to instruct the jury as requested was error." (Italics ours).

In the case at hand, the jury, after having been properly instructed by the trial Judge, returned a verdict of guilty. The appellant now in effect complains that the jury did not properly apply the instructions, and asks this Court to substitute its judgment for that of the jury.

The manner in which the Government proved the crime of perjury in the case at hand is not new or novel. The identical type of proof was presented in the case of *United States v. Goldstein*, decided in May, 1948, and recorded in 168 F. (2d) 666. The entire concurring opinion by Judge Learned Hand is quoted:

> "I agree with all that Judge Chase has said, and I also think that Belskin's testimony, which was corroborated by Zeller's testimony upon the defense, was "direct" testimony that certificates

five, six and seven had not been made out in 1941. *If 'A' swears that at a stated time there was an entry in a book and 'B' swears that he examined the book at that time, and that the entry was not there, I submit that 'B' has "directly" contradicted 'A'.* Belskin swore that when he saw the book only blank certificates followed the first four stubs. Had it been a solidly bound book that testimony would have "directly" contradicted Goldstein, who said that certificates five, six and seven had been made out in 1941. I do not understand that Goldstein disputes this; but he answers that, since the book was not solidly bound, but of the loose-leaf kind, it was possible that at the time Belskin saw it, certificates five, six, and seven may have been removed and were later replaced. That is theoretically possible but so would it be theoretically possible in the example I have put, that a solid book might be substituted for the occasion. We should not for that reason require two witnesses to the identity of the book; we should allow the jury to find that it was the identical book on any reliable evidence. So here, the evidence is that this was the stock book of Aetna Coated Fabrics, Inc., and the jury was free to infer that it had not been tampered with for the occasion, just as they might, had it been a solid book. *Were not some such latitude permissible in determining what is a "direct" contradiction, we should in effect insist upon two witnesses to every fact in a prosecution for perjury. I can find no warrant for any such dialectical extravagance, and I think that the verdict can stand as to all four certificates.*" (Italics ours).

In the Goldstein case, as in the case at hand, the appellant had testified to a positive fact. In order to prove the falsity of that fact the Government

proved the impossibility of such fact. In the Goldstein case the Government proved that if the defendant's testimony were true, the four stock certificates would have been in the book which the Government's witness had examined. In the case at hand, the Government proved that if the appellant's testimony were true, the envelope would have been in the mail box at Baker's store and would have been collected and postmarked many hours earlier than the postmark which the envelope bore. In the Goldstein case, the Government's evidence proved that the stock certificates were not in the book, and in the case at hand, the Government's witnesses proved that the envelope was not in the mail box. The cases are identical.

The appellant makes much ado in her brief about the possibility that the Government's witnesses were in error. The above quotation from the decision by Judge Hand in the Goldstein case well answers that argument. It is also pointed out that the jury heard all of the testimony and resolved the facts against the appellant. The appellant, by raising the question of the possibility of the Government's witnesses being mistaken, is actually asking this court to substitue its judgment for that of the jury.

The decision in the case of *United States v. Otto*, 54 F. (2d) 277 (2 C.A.), goes into the question of the

legal sufficiency of the evidence rather thoroughly. Much of that decision is quoted in the appellant's brief. However, the appellant has been very careful not to quote that portion of the decision which, as in the Hammer case, recognizes that there are cases where the falsity of the appellant's statement is not susceptible of proof by two eye-witnesses. The particular facts in the Otto case were susceptible of proof by eye-witnesses and, therefore, the decision dwells merely upon that subject. However, on page 279, Judge Chase states as follows:

> "*People v. Doody*, 172 N.Y. 165, 64 N.E. 807, is an instance of a conviction for perjury based on testimony of a defendant that he did not remember at a subsequent trial facts to which he had testified several times before and concerning which his memory had recently been refreshed. In that case the subject-matter dealt with was that intangible something called memory, and the proof, while called circumstantial, was as direct as the subject-matter permitted. It is obvious that all knowledge, apart from that possessed by the person himself, as to what one does remember, lies in what common experience shows he ought under given circumstances to remember. Proof of the ultimate fact can rise no higher than the limitations of human nature will allow, and when as direct proof of a fact as that fact will ever, not in the particular instance alone, but always, permit, the general rule will not preclude a conviction when the presumption of innocence has been overcome and no reasonable doubt of guilt remains. See *Marvel v. State* (DelSup.) 131 A. 317 42 A.L.R. 1058."

And then goes on to say:

> "Cases which hold that circumstantial evidence is never enough to support a conviction for perjury are illustrated by *Clayton vs. U. S.* 284 F. 537, and *Allen vs. U. S.* 194 F. 664. Without doubt, they are in the majority. *To the extent that whenever the subject-matter is in its nature susceptible of direct proof, we agree with them.*" (Italics ours).

The Otto case, therefore, upholds the Government's position in the case at hand by approving of the decision in the Marvel case which will be hereinafter discussed, as well as recognizing that perjury may be proven by other means than by two eye-witnesses.

The case of *Marvel v. State*, 131 Atlantic 317, is not binding or controlling upon this Court. The Marvel case is discussed herein since it is cited in the decision in the Otto case. In that case, the defendant testified in Probate Court that he was one of the testamentary witnesses to a will. The defendant had testified that on said day he had left Wilmington on a daily train at 6:52 p. m. and arrived at the home of his sister in Seaford at 10:00 o'clock p. m. At the home of his sister he met the testator who asked him to witness his will, and he did so. The defendant further testified that this took place between 10:00 and 12:00 p. m., and that he left on the night train,

leaving about 1:19 a. m. on the following morning and went back to Wilmington. The defendant was charged with having committed perjury in giving such testimony. To prove the falsity of the defendant's statement, the plaintiff produced the conductor of the train which left Wilmington at 6:52 p. m. on the date in question. The conductor testified that no tickets or mileage were collected, no cash fares were paid to Seaford from Wilmington on that train. It was further proved by the conductor of the train leaving Seaford at 1:19 a. m. on the following morning that the defendant was not in any of the coaches or sleepers on that train. Another witness for the plaintiff testified that he was the grandson of the testator, that he was living in his grandfather's house at night during the month in question, that he never went to bed before ten or half-past ten on any of the Friday nights during that particular month, and that he did not see the defendant on any of those nights in his grandfather's house. The Court, in its decision, after citing *United States v. Wood*, 10 L.Ed. 527, stated:

> "The evidence, though largely circumstantial, is sufficient to sustain the conviction if in other respects the right of the defendant were duly protected."

Thus the State proved a negative fact by positive and direct testimony, proving the impossibility of the testimony of the accused.

The Marvel case is likewise approved in the case, *Goins v. United States* 99 F. (2d) 147, (4 C.A.). Certiorari was applied for and denied in the Goins case. The following is quoted from the opinion:

> "It may well be doubted whether any distinction should now be made between the proof necessary to convict of perjury and that necessary to convict of other crimes. See *State v. Storey*, 148 Minn, 398, 182 N.W. 613, 15 A.L.R. 629; *Marvel v. State*, 3 W.W. Harr., Del., 110, 131 A. 317, 42 A.L.R. 1058; Wigmore on Evidence (2d ed.) Vol. 4, Sec. 2040. *The old "oath against oath" reasoning of the earlier decisions is without force now that the defendant is allowed to take the stand and that corroboration sufficient to satisfy the jury of the falsity of the oath may well arise from his demeanor and manner of testifying. Boren v. United States*, 9 Cir., 144 F. 801, 806; *State v. Miller*, 24 W. Va. 802. And in any event it is difficult to see why there should be any greater reason for charging with respect to the necessity of corroboration in such cases than there is for charging on the necessity of corroborating the testimony of an accomplice, and on the duty of scrutinizing such testimony, as to which we have recently held that the giving of such charge is a matter resting in the sound discretion of the trial judge. *Hanks v. United States*, 4 Cir., 97 F. (2d) 309. Both go to the weight to be accorded testimony by the jury; and the ordinary rule is that charging as to such matters should rest in the sound discretion of the trial judge, upon whom rests the duty of guiding and directing the jury in their consideration of the case. Little good will be accomplished by prescribing rule of thumb instructions and holding it reversible error not to give them." (Italics ours).

In the case of *Sharron v. United States*, 11 F. (2d) 689 (2 C.A.), the defendant had taken a pauper's oath to the effect that he did not have $20.00 in order to be released from custody where he was being held in default of the payment of a $750.00 fine. The evidence proved that the defendant had had $550.00 in a bank which he withdrew by check, payable to his brother, and that after the defendant was released from custody his brother returned the money to him. There were no eye-witnesses to prove any part of the falsity of the defendant's statement under oath. Judge Hand stated in the decision:

> "On the merits the case is perfectly clear. How there can be any doubt of the defendant's guilt, we cannot conceive. The proof from the checks and passbooks themselves, coupled with the oath and conviction to escape for which the oath was taken, make a patent case of perjury, sufficiently corroborated under the modern rule that documents will serve for corroboration. *Indeed, the old canonical necessity of two oaths has now very little life left.* The silly explanation of the defendant and his brother deserved less consideration from the jury than it got.
>
> "The supposed errors in the conduct of the case are trivial; they would have been of no importance, had the defendant's guilt been less apparent, and in so plain a case they require no comment." (Italics ours).

The appellant relies heavily upon the case of *Phair v. United States*, 60 F. (2d) 953. The decision

in that case, although confining itself to particular facts of the case, recognizes the exception as set out in the Hammer case that perjury can be proved by means other than eye-witnesses, in the following language:

> "Whereas, in this case reliance is made upon the testimony of the witnesses, * * * "

the two-witness rule applies.

Then after citing the Wood and Hammer cases, supra, the decision states:

> "A living witness is no longer necessary to a conviction for perjury where the defendant's own acts, business transactions, documents or correspondence show that his oath charged to be perjury is false."

The envelope which the appellant testified she mailed bore a postmark dated and timed much later than the time which the envelope would have been so marked had her testimony been true. This is a document which the appellant claims sprang from her own acts and transactions. The appellant further testified that she read the address on the envelope before she mailed it by the light coming in from the windows (T.P. 362). This was supposed to have taken place at 7:00 a. m. in the middle of January in Bremerton, Washington. Both the Court and the jury are entitled to take judicial notice of the fact that it is still very dark at 7:00 a. m. in the middle of January in Bremerton, Washington. In other words, the ap-

pellant by her own testimony has proved her perjury.

In *Hart v. United States*, 131 F. (2d) 59 (9 C.A.), the defendant had testified under oath that she did not own a certain piece of property. It was charged that this testimony was false. The evidence showed that another party was the owner of the property and also the grantee in the deed, and further that the title insurance policy was in the name of the other party. The only evidence produced by the Government was that the defendant had furnished the purchase money. The Court stated on pages 62 and 63:

> "It is true that the defendant furnished the purchase money, but the possibility that she made it some time in the future, claiming a resulting trust by reason thereof is not clear, convincing, and direct evidence of ownership as will support a verdict.

In the Hart case, the Court properly ruled that the evidence was not legally sufficient because in a legal sense a person furnishing the purchase money is not necessarily the owner when the deed is made to another party. The Hart case is therefore of no help in deciding the issues in the case at hand.

The appellant relies heavily upon *Allen v. United States*, 194, F. 664, (5 C.A.). On pages 12 and 13 of the appellant's brief the Allen case is discussed, and

a quotation is made from the decision in that case. The quotation thus used in the appellant's brief is a statement of the facts of the case and not a discussion of the law involved. In the Allen case the Court was considering the propriety of the instructions to the jury. The lower court had instructed the jury improperly without regard for any of the rules of evidence in perjury cases. In the case at hand, the jury was properly instructed. In the Allen case, the appellate court reversed the lower court on the ground that the instructions as given were prejudicial. The decision then goes on to discuss at length the evidence required in perjury cases, and says as follows on pages 667 and 668:

> "*There is no question that there are cases in which neither the two witnesses of the earlier law nor the one witness with strong corroboration of the later are required to support a conviction.* The courts and the text-writers have said that the oath of a living witness to the falsity of the statement in question is not indispensable —
>
> > '(1) where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself with circumstances showing the corrupt intent; (2) in cases where the matter so sworn is contradicted by a public record, proved to have been well known to the prisoner when he took the oath, the oath only being proved to have been taken; and (3) in cases where the party is charged with taking an oath contrary to what he must have known neces-

> sarily to be true, the falsehood being shown by his own letters relating to the fact sworn to, *or by any other written testimony existing and being found in his possession and which has been treated by him as containing the evidence of the fact recited in it. United States v. Wood*, 14 Pet. 440, 441, 10 L.Ed. 527; 1 Greenleaf on Evidence § 258.' (Italics ours).
>
> *It may well be that a conviction might be sustained under still other circumstances, although the living witness was not forthcoming.* If so, the evidence that the defendant had in fact foresworn himself must be direct and positive. If true, it must demonstrate the defendant's guilt. Such was the testimony held sufficient in *People v. Doody*, 172 N.Y. 165, 64 N.E. 807." (Italics ours).

As stated from the above quotation, evidence which demonstrates the defendant's guilt is sufficient, although the living witness was not forthcoming. The quotation from Greenleaf on Evidence set out in the above decision, wherein *United States v. Wood* is referred to, further supports the Government's contention. In the case at hand, there was written testimony, the envelope, existing and in the possession of the appellant at the time she testified and it was treated by her as containing the evidence of the fact recited thereon. The appellant had the envelope in question in her hand and claimed it when she testified that that was the envelope she put in the mail box at Baker's store at 7:20 a. m. on Jan-

uary 13, 1948. That envelope bore the postmark "Bremerton, Wash., 5:00 p. m., January 14, 1948." The Government's evidence was clear and direct that that envelope could not have been placed in the mail box at Baker's store at the time the appellant so testified.

On page 12 of her brief, appellant seeks to distinguish the rules laid down in perjury cases arising from bankruptcy proceedings from those made in general perjury cases. The appellant cites as examples *United States v. Isaacson*, 59 F. (2d) 966 (C.C.A. 2), in explanation, with quotations citing *Kahn v. United States*, 214 F. 54, and *Schonfeld v. United States*, 277 F. 934, and *Hashagen v. United States*, 169 F. 396. In the Isaacson case, as especially noted in the Kahn case, the defendant was prosecuted under a special statute, being part of the Bankruptcy Act. This fact was noted in each of the above cases. The Isaacson case was an indictment for perjury for alleged false statements that the defendant did not remember certain facts. The Isaacson case held only that the uncorroborated oath of one individual against the oath of the defendant is not enough to prove that the defendant did or did not remember certain facts. It held in effect that an uncorroborated oath against oath is not suficient in any case. It is for the defendant's protection from conviction on "oath against

oath" testimony that all the ancient and written rules of evidence have been made. The Court found actually that evidence sufficient for conviction, as outlined in *United States v. Wood*, supra, in a general perjury case is sufficient for conviction under the special Bankruptcy Act. In each of these cases the appellant sought to hold the Government to a higher degree of proof in bankruptcy cases than the Supreme Court has held to be necessary in *Hammer v. United States*, supra, and *United States v. Wood*, supra. In each case the Court applied the rules of evidence necessary to convict in perjury as set forth in the *Hammer* and *Wood* cases. In the case of *Jacobs v. United States*, 31 F. (2d) 568, (6 C.A.), the perjury, while committed in bankruptcy proceedings, was prosecuted as general perjury, and no distinction was made by the Appellate Court in relying on the sufficiency of the evidence. Certiorari was denied by the Supreme Court, 279 U.S. 869. The Government introduced no witnesses to testify to the falsity of the statement for which Jacobs was indicted. The Government relied on the character of the evidence referred to in *United States v. Wood* and *Hammer v. United States.* The defendant introduced evidence to produce the truth of the statement. The Court held that the jury had the right to accept the Government's evidence as against evidence which the appellant offered to

the contrary. The case is very similar to the Ruth Radomsky case, except that the corroborated testimony in the Ruth Radomsky is much stronger.

In the case of *Kahn v. United States*, 214 Fed. 54 (2 C.A.), the sufficiency of the evidence required in a perjury case is thoroughly discussed in the following language:

> "However, the ancient rule of the common law requiring two witnesses to contradict the defendant's oath has been practically annulled and at present the rule in several jurisdictions means hardly more than the common-law rule that the defendant must be proved guilty beyond a reasonable doubt.
>
> The rule is stated in Cyc. vol. 30, page 1452, as follows:
>
> 'Positive and direct evidence is absolutely necessary in a perjury case. Direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by the defendant on trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him.'
>
> In *U. S. v. Wood*, 14 Pet. 430, 10 L.Ed. 527, the court reached the conclusion that where the contradiction comes directly from the defendant perjury may be proved without the aid of a living witness. In other words, the court held that rule is not an arbitrary one and where the probative force of the testimony is equal to that of two

witnesses or to one witness corroborated, it is sufficient.

In *Hashagen v. United States*, 169 Fed. 396, at page 399, 94 C.C.A. 618 at page 621, the court, speaking of the old rule, says:

'But this strictness has long since been relaxed, and we find many cases in the books where convictions have been sustained upon the testimony of a single witness, corroborated by circumstances proved by independent evidence sufficient to warrant the jury in saying that they believe one rather than the other.'

In the case of *People v. Doody*, 172 N.Y. 165, 64, N.E. 897, the Court of Appeals of New York upheld a conviction of perjury where the defendant swore that he did not remember certain material facts when the testimony showed that he did remember them."

After quoting the above rules as applied to general perjury, the Court especially said that lesser evidence than above quoted would be sufficient to convict under Section 29 (b) (2) of the Bankruptcy Act.

In the case of *Gordon v. United States*, 5 F. (2d) 943 (8 C.A.), the defendant was indicted for perjury for a false statement before a Referee in Bankruptcy. The defendant testified in his own behalf. No assertion was made that less evidence was required in such case than is required to prove any other type of perjury. The defendant appealed from a denial of a directed verdict on the ground that the two-witness

rule or one-witness rule with corroboration is indispensable to sustain conviction of perjury, and further that the evidence must be incompatible with innocence and incapable of explanation on any other reasonable hypothesis than guilt. The Court on page 945 affirmed the conviction and held that:

> "Clear and direct testimony of one or more witnesses, or the testimony of one witness and convincing corroborating circumstances, *or indubitable facts absolutely incompatible with the truth of the testimony charged to be false, may be ample to sustain a verdict for perjury. United States v. Wood*, 39 U.S. (14 Pet.) 428, 437, 438, 439, 440, 441, 442, 10 L.Ed. 527; *Hashagen v. United States*, 169 F. 396, 399, 94 C.C.A. 618; *Kahn v. United States*, 214 F. 54, 56, 130 C.C.A. 494." (Italics ours).

The appellant seeks to discredit the evidence produced in this case by the Government by quoting numerous abstract definitions of direct testimony and circumstantial evidence. These definitions were made when considering particular cases and should not be construed as covering every conceivable set of facts. The cases decided by the Federal Court system in general support the following statement in 48 Corpus Juris, at page 902, under Section 169:

> "Direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by accused, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely

incompatible with his evidence, or physically inconsistent with the facts so testified to by him."

The case of *Smith v. United States*, 169 F. (2d) 118, further supports the Government's contention that the above quoted statement from Corpus Juris is in fact the rule followed in the Federal Court system. The Court states on page 121:

> "Appellant is right in his contention that there can be no lawful conviction in a perjury case when an answer of the defendant, under oath, to a question propounded to him is 'literally accurate, technically responsive, or legally truthful.' It is also true that, to sustain a conviction, it must be shown by clear, convincing and direct evidence to *a moral certainty and beyond a reasonable doubt* that the defendant committed willful and corrupt perjury. The following cases, cited by appellant, sustain the contention. *Hart v. United States*, 9 Cir., 131 F. (2d) 59, 61; *Fotie v. United States*, 8 Cir., 137 F. (2d) 831, 840; *United States v. Slutzky*, 3 Cir., 79 F. (2d) 504, 505; *Allen v. United States*, 4 Cir., 194 F. 664, 668. It should be observed, however, that in *Hart v. United States*, supra, and in *United States v. Slutzky*, supra, convictions on the first count of the respective perjury indictments were reversed; but convictions of perjury on the second count were confirmed in both cases." (Italics ours).

As has been explained in the citations quoted by the appellant in her brief as well as the citations herein quoted, the purpose of the two-witness rule, together with its modifications, is to protect a defend-

ant from being convicted for perjury where the evidence is one oath against one oath. It cannot be questioned that the practical aspect of the rule is to protect the defendant from being convicted of perjury solely upon the testimony of one witness when that witness might be testifying falsely, thus leaving the jury with the burden of determining who is testifying to the truth without the assistance of any corroborating circumstances. In the case at hand, there was the oath of six witnesses pitted against the oath of the defendant. All six of these witnesses from the Post Office at Bremerton would have to have testified falsely before the appellant's testimony could be true. The testimony of these six witnesses, of course, is exclusive and in addition to the document emanating from the appellant, as well as the evidence of the bribe given the appellant by Olson.

In addition to the testimony of the six postal empolyees and the document emanating from the appellant herself, there is present in this case, the testimony of the appellant who took the stand in her own defense. It is a well recognized rule that where a defendant takes the stand in a perjury case, the jury may consider his demeanor and manner of testifying, as well as the substance of his testimony in determining whether or not he is telling the truth. Syllabus No. 12 in the case of *People v. Todd*, 49 P.

(2d) 611 (Cal.), reads as follows:

> "Where jury had found against party accused of perjury upon her claim, based entirely upon her own testimony, that falsity of statements had been result of an honest mistake, District Court of Appeals could not interfere with such conclusion since jury was sole judge of the credibility of witnesses and facts of case."

In the case of *Boren v. United States*, 144 Fed. 801, (9 C.A.) the court stated on page 806:

> "In addition to this there is the fact that the plaintiff in error testified at length in his own behalf whereby the jury had the opportunity to observe the demeanor and manner of testifying. In such demeanor and manner of testifying as well as in the substance of the testimony as it appears in the record, the jury may have found corroboration of the testimony of the witnesses for the United States."

III.

The third specification of error as set out in the appellant's brief is to the effect that the trial judge erred in denying the defendant's motion for a new trial.

The United States Supreme Court has repeatedly held that the overruling of a motion for a new trial is not assignable as error. In *Wheeler v. United States*, 159 U.S. 523, 40 L.Ed. 244, the United States Supreme Court stated:

> "Another contention is that the Court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore v. United States*, 150 U. S. 57; *Holder v. United States*, 150 U. S. 91; *Blitz v. United States*, 153 U.S. 308."

The *Wheeler* case just quoted was an appeal from a murder conviction where the defendant had been sentenced to hang. See also *Klune v. United States*, 159 U.S. 590, 40 L.Ed. 269, and *Lueders v. United States*, 210 Fed. 419 (9 C.A.), for similar holdings.

IV.

The fourth specification of error as set out in the appellant's brief is that the trial judge erred in entering a judgment and sentence upon the verdict returned by the jury.

The appellant having failed to challenge the sufficiency of the evidence at the conclusion of all of the evidence by a motion for a judgment of acquittal, and the court having fully considered the merits of such a motion the same as though the same had been made at the proper time and ruled that there was sufficient evidence to justify the verdict, the trial judge committed no error in entering the judgment and sentence.

CONCLUSION

The appellant in this case does not decry her

innocence but complains of a technicality that she was not convicted upon the testimony of two eye witnesses or one eye witness and corroborating testimony. It is conceded that there were no eye witiesses to testify that they saw the appellant when she did not mail the envelope. It is contended by the appellee that the proof of the falsity of appellant's statement is not susceptible to proof by the testimony of eye witnesses. As has heretofore been pointed out, the defendant was convicted upon a document emanating from herself, upon the testimony of six employees from the Post Office at Bremerton testifying to the impossibility of the truth of her testimony, upon the testimony showing she had received a bribe for her testimony, and also upon the testimony of the appellant herself wherein she made statements absolutely incompatible with physical facts.

In concluding, it is respectfully submitted that the trial judge made no errors in the conduct of the trial and that the defendant was properly convicted upon legally sufficient evidence.

Respectfully submitted,

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